

DATE: October 18, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12528

ECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Kenneth Davie, Esq.

SYNOPSIS

Applicant used marijuana from 1977-2003, including while holding an interim security clearance. In a security clearance application (SCA) and in a signed, sworn statement, Applicant denied illegally using drugs in the previous seven years. Applicant failed to mitigate drug involvement, personal conduct, and criminal conduct security concerns raised by his drug use and intentional falsification of material information on his SCA and in a signed, sworn statement. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 25 November 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision--security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 4 February 2004 and elected to have a hearing before an administrative judge. The case was originally assigned to another judge, but was reassigned to me on 2 June 2004. On 23 August 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 1 September 2004.

FINDINGS OF FACT

Applicant is a 44-year-old security officer for a defense contractor. He obtained an interim security clearance in May 2002. The facility security officer applauds Applicant's "outstanding work ethic" and considers him a valuable member of the security staff.

Applicant used marijuana with varying frequency from 1997 to at least February 2003. From 1982-February 2003, the use was sporadic--only two to three times a year. He used marijuana twice since he went to work for his current employer, the last time with a friend who stopped by Applicant's house to watch television. Ex. 3 at 1.

In July 2000, Applicant attended a rock concert and met some friends from college. The friend were smoking marijuana and Applicant took a few puffs of it. One of the friends gave Applicant a matchbook that had a small marijuana cigarette in it. Applicant realized it was marijuana and put it in his pocket. On his way home, Applicant was stopped by police for driving while intoxicated (DWI). When the police searched Applicant, they found the matchbook with the marijuana in the pocket of his pants. Ex. 3 at 2. Applicant pled guilty to the DWI offense; the marijuana charge was dismissed. Ex. 2 at 2.

On 25 April 2002, Applicant completed his SCA by signing the certification that his statements on the form were "true, complete, and correct" to the best of his "knowledge and belief." Ex. 1 at 6. His signature also acknowledged his understanding that "a knowing and willful false statement" could be punished as a violation of 18 U.S.C. § 1001. Question 27 asked if, in the previous seven years, Applicant had illegally used any controlled substances, to include marijuana. Applicant answered "no." Ex. 1 at 5.

Applicant provided a signed, sworn statement to a Defense Security Service (DSS) agent on 16 August 2002. In it, he denied using any illegal drugs or narcotics since the late 1970s. He insisted he did not know there was marijuana in the matchbook or how it got there. Ex. 2 at 1, 2. He offered to "undergo a lie-detector test to support [his] claim." *Id.* at 2. On 21 April 2003, Applicant was interviewed by another DSS agent who administered a polygraph. After the agent told him he failed the exam, Applicant admitted he knew about the marijuana in the matchbook, he had smoked marijuana two to three times a year since he left college in 1982, he had smoked marijuana twice (September 2002 and February 2003) while he held an interim secret clearance, and he intentionally falsified his SCA because he was embarrassed. Ex. 3.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline H--Drug Involvement

In the SOR, DOHA alleged Applicant used marijuana from 1977-2003 (¶ 1.a), was arrested for DWI and possession of marijuana in 2000 (¶ 1.b), and used marijuana while holding an interim clearance (¶ 1.c). The improper or illegal involvement with drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant's use of marijuana amounts to drug abuse. DC E2.A81.2.1. He also possessed marijuana. DC E2.A8.1.2.2. None of the mitigating conditions under the guideline apply. Applicant's use was recent, long-term, and continued after he knew drug use was of concern to the Government. Even when confronted by the DSS agent, rather than take responsibility for his actions, Applicant challenged the DSS agent to give him a polygraph so he could prove he had not used any illegal drugs since the 1970s. Although Applicant asserts he will not use illegal drugs in the future (*see* MC E2.A8.1.3.6), I was not convinced of his commitment to leading a drug-free life. I find against Applicant.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA concerning his use of drugs (¶ 2.a), on a signed, sworn statement in which he denied using marijuana after the 1970s (¶ 2.b), and on a signed, sworn statement in which he denied knowing he was carrying marijuana when arrested in July 2000 (¶ 2.c). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant deliberately omitted from his SCA his use of marijuana in the previous seven years. In his signed, sworn statement he denied using marijuana since the 1970s and denied knowing there was marijuana in the matchbook he was carrying when arrested in July 2000. An applicant's drug abuse is material in determining an applicant's security worthiness. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

After the polygraph exam, Applicant admitted using marijuana as recently as February 2003 and knowing he had marijuana in his possession when he was arrested in 2000. The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant deliberately falsified his SCA (DC E2.A5.1.2.2) and the signed, sworn statement to the DSS agent (DC E2.A5.1.2.3). Applicant's drug use was relevant and material to a determination of his security worthiness. None of the mitigating conditions listed under the guideline apply. Applicant's refusal to take responsibility for his drug abuse, even after being confronted by a DSS agent, demonstrates his lack of candor. I find against Applicant.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was engaged in criminal activity by being arrested for DWI and possession of marijuana (¶ 3.a) and violated 18 U.S.C. § 1001 by falsifying his SCA and the signed, sworn statement he made to a DSS agent (¶ 3.b). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. An applicant's drug abuse is material to a determination of his security worthiness. Applicant deliberately lied in the SCA and in the signed, sworn statement he completed for a DSS agent for the purpose of obtaining a security clearance. Ex. 3 at 2. None of the mitigating conditions apply. I find against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).